STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2010
v KENNETH JOHNSON, Defendant-Appellant.	No. 292238 Wayne Circuit Court LC No. 09-000732-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARIEO MAURICE STURGES, Defendant-Appellant.	No. 292920 Wayne Circuit Court LC No. 09-000732-FC

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

A jury convicted defendants Kenneth Johnson (Johnson) and Marieo Sturges (Sturges) of armed robbery, MCL 750.529, carjacking, MCL 750.529a, unlawfully driving away an automobile ("UDAA"), MCL 750.413, and possession of a firearm during the commission of a felony, MCL 750.227b. The jury also convicted defendant Johnson of felon in possession of a firearm, MCL 750.224f. The trial court sentenced Johnson, as a fourth habitual offender, MCL 769.12, to 12 to 24 years' imprisonment for the armed robbery and carjacking convictions, and two to five years' imprisonment each for the UDAA and felon-in-possession convictions, all of which are to be served concurrently but consecutive to a two-year term of imprisonment for the felony-firearm conviction. The trial court sentenced Sturges to concurrent prison terms of 12 to 20 years' imprisonment for the armed robbery and carjacking convictions, and two to five years' imprisonment for the UDAA conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Johnson appeals as of right in Docket No. 292238, and Sturges appeals as of right in Docket No. 292920. We affirm in part and vacate in part in both appeals.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In Docket No. 292238, Johnson argues that he was denied the effective assistance of counsel when his attorney failed to seek suppression of Scott Dallo's in-court and voice identifications of him. We disagree. Because Johnson failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review of this issue is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *People v Sabin (On Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, 262 Mich App at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, 462 Mich at 302.

Johnson argues that his attorney should have sought to suppress Dallo's in-court identification of him on the basis of the suggestive nature of the corporal lineup. An unduly suggestive pretrial identification procedure precludes an in-court identification unless the witness has an independent basis for the in-court identification. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). The relevant inquiry is whether the lineup was unduly suggestive in light of all the circumstances surrounding the identification. *People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).

Johnson argues that the totality of the circumstances rendered the corporal lineup unduly suggestive. He contends that although the lineup occurred three hours after the incident, Dallo was unable to identify him without first hearing him speak. Johnson asserts that the lineup was highly suggestive in part because Dallo was told before the lineup that the police had apprehended the perpetrators. Dallo testified that although the police informed him that they had taken four men into custody, he did not know whether the men would be placed in the lineup. He maintained that he discovered that the two perpetrators participated in the lineup only when he saw them in the lineup.

Johnson also argues that the lineup was unduly suggestive because the lineup participants varied based on their age, height, weight, and hairstyles, and were similar only regarding their sex and race. Differences among lineup participants, however, are significant only if they are apparent to the witness and distinguish the defendant from the other participants such that there exists a substantial likelihood that the differences among the participants, rather than the witness's recognition of the defendant, was the basis for the identification. *Kurylczyk*, 443 Mich at 312. Here, the differences among the lineup participants rather than Dallo's identification of Johnson was not the basis for the identification because Dallo was unsure of his identification until he heard the participants' voices. Dallo also testified that he remembered that Johnson had

an "older-looking face." In any event, physical differences among lineup participants generally relate to the weight of an identification rather than its admissibility. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

Johnson also contends that defense counsel should have moved to suppress Dallo's voice identification of him. A person's voice is a competent means of identification if the identifying witness is positive or certain of the identification and there exists some reason to which the witness attributes his ability to make the identification. *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983). The most common, but not the exclusive, reasons are a peculiarity in the person's voice or the identifying witness's previous knowledge of the person's voice. *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009); *People v Bozzi*, 36 Mich App 15, 22; 193 NW2d 373 (1971).

Johnson argues that Dallo testified that there was nothing peculiar about Johnson's voice. To the contrary, Dallo testified that Johnson's voice was deep and his words were strung together. Dallo testified that he remembered Johnson's voice "pretty well" and wanted to hear if the person he suspected was Johnson mumbled his words. After hearing Johnson's voice, Dallo was 90 to 99 percent certain that Johnson was the perpetrator. It was up to the jury to determine how much weight to place on Dallo's voice identification. *Bozzi*, 36 Mich App at 22.

Because the live lineup and voice identifications of Johnson were not unduly suggestive, there was no reason to suppress Dallo's in-court identification. *Gray*, 457 Mich at 114-115. Although Dallo identified two other persons in a photographic lineup conducted after the corporal lineup, this fact did not render the corporal lineup unduly suggestive. Dallo's photographic lineup identifications affected only the weight rather than the admissibility of his identification testimony.

In *Gray*, 457 Mich at 109, following the victim's tentative identification of the defendant in a corporal lineup, a police officer told the victim that a suspect had been arrested and showed her a photograph of the defendant. Our Supreme Court determined that,

> the extent to which the victim's testimony regarding the corporal lineup may have been influenced by the suggestive display of the photograph is an issue that speaks to the weight of the testimony rather than its admissibility. There is no question that the victim picked defendant out of the lineup; the only issue in dispute is how certain she was about the initial identification. Thus, the victim's testimony addresses the level of certainty of the identification, not the existence of the identification itself. While this may be fertile ground for cross-examination, it should not prevent the introduction of the in-court identification. [*Id.* at 122.]

Similarly, in this case, Dallo identified Johnson as one of the perpetrators in the corporal lineup and was between 90 and 99 percent certain of his identification. To the extent that his identification of another individual in a photographic lineup may have called into question the reliability of his initial identification, this factor affected only the weight of his in-court identification rather than its admissibility. Because Dallo's in-court and voice identifications of Johnson were properly admitted, counsel was not ineffective for failing to seek their suppression. Defense counsel does not render ineffective assistance by failing to assert futile arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II. DOUBLE JEOPARDY

In Docket No. 292920, Sturges argues that his convictions of both carjacking and UDAA violated his constitutional protection against double jeopardy. Because Sturges failed to preserve this issue by raising it in the trial court, our review is limited to plain error affecting his substantial rights. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

"The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The Double Jeopardy Clause of both constitutions protects against (1) a second prosecution for the same offense following either acquittal or conviction, and (2) multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). In *Smith*, our Supreme Court held that the term "same offense" in the context of the "multiple punishments" strand of our double jeopardy jurisprudence has the same meaning as that term connotes in the "successive prosecutions" strand of our jurisprudence. *Id.* at 315-316 Thus, in the absence of clear legislative intent to impose multiple punishments, courts must apply the *Blockburger*[1] "same elements" test to determine whether multiple punishments are constitutionally permitted. *Id.* at 316. Under the same elements test, multiple punishments are permissible as long as each of the crimes of which a defendant is convicted contains an element that the other does not. *Id.* at 296, 316-319. But "[i]f the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements[.]" *McGee*, 280 Mich App at 683.

Initially, Sturges argues that in *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), our Supreme Court "reduced the status" of the *Blockburger* test to a mere "tool" to be used in determining whether multiple punishments have been imposed in violation of double jeopardy principles. Sturges's argument lacks merit. To the contrary, the *Ream* Court held:

> Therefore, the *Blockburger* test once again is the controlling test for addressing double-jeopardy challenges, and the *Blockburger* test focuses on the statutory elements of the offense. [*Id.* at 237 (quotations, citations, and brackets omitted).]

Although the Court also stated, "[w]e must not lose sight of the fact that the *Blockburger* test is a tool to be used to ascertain legislative intent," *id.* at 238, the Court did not diminish the status of the test. Immediately following that statement, the Court clarified, "Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements." *Id.* Thus, contrary to Sturges's argument, the *Ream* Court reaffirmed that the *Blockburger* test is the "controlling test" for analyzing double jeopardy challenges. *Id.* at 237.

The prosecutor argues that the Legislature clearly intended to impose multiple punishments because § 529a(3) of the carjacking statute specifically allows two separate

[1] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932).

convictions stemming from the same transaction. We disagree. Subsection 529a(3) of the carjacking statute provides:

> A sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction.

The above quoted language is not a clear expression of the Legislature's intent to impose multiple punishments for the same conduct. Rather, the provision simply authorizes the imposition of consecutive sentences at the sentencing court's discretion. Because the Legislature did not clearly intend to impose multiple punishments, we must next determine whether the *Blockburger* same elements test is satisfied. *Smith*, 478 Mich at 316.

The prosecutor argues that carjacking requires the use of force or violence or the threatened use of force or violence and UDAA, unlike carjacking, requires the actual driving away of the vehicle. The elements of carjacking are: (1) that during the course of committing a larceny of a motor vehicle, (2) the defendant used force or violence or threatened the use of force or violence or putting in fear, (3) a victim who was the operator, passenger, or person in lawful possession of the vehicle or lawfully attempting to recover the vehicle. MCL 750.529a. MCL 750.529a. Contrary to the prosecutor's argument, carjacking requires the driving away of a motor vehicle because the term "larceny" requires the carrying away or asportation of the subject property. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Thus, the offenses of UDAA and carjacking do not each contain an element that the other statute does not. Accordingly, multiple punishments are not constitutionally permitted and, therefore, constitute plain error. *Smith*, 478 Mich at 316. Further, this plain error affects Sturges's substantial rights because it subjects him to more punishment than is constitutionally permitted. Therefore, we vacate Sturges's UDAA conviction and sentence.

Sturges contends that doing so will also reduce his score for prior record variable ("PRV") 7, thus entitling him to resentencing. MCL 777.57 directs the sentencing court to score 20 points if an offender has two or more subsequent or concurrent convictions. Subsection (2)(b) states, "[d]o not score a felony firearm conviction in this variable." Sturges was assessed 20 points for PRV 7 based on his two concurrent felony convictions, UDAA and armed robbery. Vacating his UDAA conviction will reduce his PRV 7 score to ten points, which will likewise reduce his total PRV score from 39 to 29 points. However, this reduction does not affect Sturges's placement in PRV level "D" (25 to 49 points), so his sentencing guidelines range will remain at 108 to 180 months. See MCL 777.62. Because vacating Sturges's UDAA conviction does not alter the appropriate guidelines range, resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Although Johnson does not raise this double jeopardy issue on appeal, the same analysis applies with respect to his UDAA and carjacking convictions. We therefore sua sponte vacate Johnson's UDAA conviction and sentence as well. Even assuming Johnson would also receive a 10-point PRV reduction, this reduction would likewise not affect Johnson's placement in PRV level "D" (25 to 49 points). Thus, resentencing is not required.

III. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Sturges next argues that his attorney was ineffective for failing to object to the prosecutor's improper remarks during closing and rebuttal arguments. We disagree. Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). But because Sturges did not object to the prosecutor's conduct at trial, this claim is not preserved and our review is limited to plain error affecting his substantial rights.[2] *Id*. at 451. Moreover, because Sturges did not preserve his ineffective assistance of counsel claim by raising the issue in an appropriate motion in the trial court, our review of that issue is limited to errors apparent on the record. *Ginther*, 390 Mich at 443; *Jordan*, 275 Mich App at 667; *Sabin*, 242 Mich App at 658.

Sturges argues that the prosecutor improperly vouched for Dallo's credibility and professed his personal belief in Sturges's guilt during closing argument. A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may, however, argue from the facts that certain witnesses are credible while others are not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

The challenged comments were proper. The prosecutor did not improperly imply that he had some special knowledge regarding Dallo's truthfulness. Although the prosecutor used the terms "I believe" and "I found him to be very believable," his arguments were based on Dallo's demeanor and the evidence presented during trial. See *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988). The prosecutor properly could argue that Dallo was worthy of belief based on the facts of the case, his demeanor while testifying, and his consistency. A witness's demeanor is a proper consideration in determining credibility. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Thus, the prosecutor's remarks were proper.

Sturges also challenges the prosecutor's remarks during rebuttal argument. Again, the prosecutor's argument was not improper. The prosecutor properly argued from the evidence that Dallo was worthy of belief. In addition, the prosecutor's use of the word "I" did not imply that he had special knowledge regarding Dallo's credibility. Thus, the comments were not improper. Because no plain error occurred, defense counsel was not ineffective for failing to object to the remarks. *Cox*, 268 Mich App at 451; *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

We vacate defendants' UDAA convictions and sentences and affirm in all other respects.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

[2] Although the prosecutor asserts that Sturges's argument regarding one of the prosecutor's remarks is preserved, the record discloses that only Johnson's counsel objected to that remark and Sturges's counsel did not join in the objection.